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Siti Aisyah v Public Prosecutor

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HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NOS BA-44–319–11 OF 2018 AND 45B-37–06 OF 2017
AZMI ARIFFIN J
17 DECEMBER 2018

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Criminal Procedure — Disclosure of information — Summons to produce — Discovery — Duty to supply police statements — Whether accused entitled to police statements of witnesses offered at the end of prosecution stage — Whether police statements were privileged document — Criminal Procedure Code ss 51(1) & 112

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This was an application made by the accused under s 51(1) of the Criminal Procedure Code ('the CPC') for an order from the court to direct the prosecution to supply copies of statements recorded under s 112 of the CPC for the witnesses offered by the prosecution to the defence at the close of the prosecution's case. The accused contended that it was the duty of the public prosecutor to disclose all relevant documents to the defence to ensure the accused gets a fair trial, and that the statement recorded under s 112 of the CPC could never be privileged as the law allowed it to be admitted as evidence. The statements were not the property of the government, but instead the property of the public to ensure that justice was done. The accused also urged the court to apply the development of the law in other Commonwealth jurisdiction which imposed some form of non-statutory disclosure obligation on the part of the prosecution. The accused also contended that there was no danger of tampering with the witnesses as the prosecution had completed its case and the statements which the accused requested were from the witnesses offered by the prosecution. The respondent contended that s 112 of the CPC statements were privileged documents which could not be supplied to the accused because there was a real danger of tampering with witnesses. The respondent contended that the accused had been accorded a fair trial and the requirement of justice had already been met when the prosecution had given all the documents and materials requested by the defence before and in the course of the trial. The respondent further submitted that there was no lacuna in our CPC relating to the issue of disclosure by the prosecution, hence s 5 of the CPC was non-applicable. Authorities and principles on prosecutorial common law disclosure could not be adopted as it was only persuasive and not binding and this court was bound by the Federal Court decision in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 as it was still good law.

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Held, dismissing the application:

(1) A police statement was an absolutely privileged document, which remained privileged and the obligation to preserve the police statements was a continuing one and would never end even when the case had been disposed off (see para 21).

(2) A police statement belonged to a special class of document, the prosecution was under no duty to supply a copy of the statement taken to the defence unless the prosecution himself had waived the privilege over the witness statements. The immunity could be waived when the testimony of the witness who made the police statement had been challenged and the defence or prosecution proposed to impeach his credit, only then can the court intervene and exercise it's discretionary power and determine whether it was relevant, necessary or desirable in the interest of justice for the prosecution to supply the statement to the defence (see para 22).

(3) Section 5 of the CPC was not applicable as there was no lacuna in the CPC on this issue making it unnecessary to resort to English law and other foreign jurisdictions (see para 23).

(4) Even at the defence stage tampering of witness/witnesses could always happen in many forms. The police statement recorded under s 112 of the CPC could never be categorised as 'unused material' because of its absolute privilege nature. The discretionary powers given to the court was not only to ensure no tampering of witnesses at any stage of the proceeding but also to ensure a fair trial and the avoidance of miscarriage of justice (see paras 24–25).

(5) In the present case, even if the court dismissed the accused's application for discovery, the accused's right to a fair trial had not been deprived as after having alerted and accepted the offer of the witnesses, the accused would have an automatic right to interview the offered witnesses and to decide whether to call them as a defence witness or otherwise (see para 28).

[Bahasa Malaysia summary

Ini merupakan satu permohonan tertuduh di bawah s 51(1) Kanun Tatacara Jenayah ('KTJ') untuk satu perintah mahkamah untuk mengarahkan pendakwaan mengemukakan salinan kenyataan yang dirakam di bawah s 112 KTJ untuk saksi-saksi yang ditawarkan oleh pihak pendakwaan kepada pihak pembelaan di akhir kes pendakwaan. Tertuduh menyatakan adalah menjadi tanggungjawab pihak pendakwa raya untuk mendedahkan semua dokumen relevan kepada pihak pembelaan untuk memastikan tertuduh mendapat perbicaraan yang adil, dan kenyataan yang dirakam di bawah s 112 KTJ tidak boleh diberi keistimewaan memandangkan undang-undang membenarkan ianya diterima sebagai keterangan. kenyataan-kenyataan tersebut bukan milik kerajaan, tapi merupakan milik awam bagi memastikan bahawa keadilan

dilaksanakan. Tertuduh juga menggesa mahkamah untuk mengguna pakai perkembangan undang-undang dalam bidang kuasa Commonwealth lain yang mengenakan tanggungjawab untuk mendedahkan *non-statutory* pada pihak pendakwaan. Tertuduh juga menyatakan bahawa tiada bahaya mengaitkan saksi kerana pihak pendakwaan telah pun selesai dengan kesnya dan kenyataan-kenyataan yang tertuduh pohon merupakan daripada saksi yang ditawarkan oleh pihak pendakwaan. Responden menghujahkan bahawa kenyataan s 112 KTJ merupakan dokumen istimewa yang tidak boleh dibekalkan kepada tertuduh kerana wujud bahaya sebenar pembegaan saksi. Responden menghujahkan bahawa tertuduh telah diberikan perbicaraan yang adil dan kehendak keadilan telahpun dipenuhi semasa pendakwaan memberikan semua dokumen dan bahan-bahan yang dipohon oleh pembelaan sebelum dan sewaktu perbicaraan berlangsung. Responden turut menghujahkan bahawa tiada kelompongan di dalam KTJ berkenaan isu pendedahan oleh pendakwaan, oleh itu, s 5 KTJ tidak terpakai. Autoriti dan prinsip berkenaan dengan pendedahan pendakwaan *common law* tidak boleh diguna pakai memandangkan ianya hanya menyakinkan dan tidak mengikat dan mahkamah ini terikat dengan keputusan Mahkamah Persekutuan dalam *Husdi v Pendakwa Raya* [1979] 2 MLJ 304 dan ianya masih undang-undang yang mantap.

Diputuskan, menolak permohonan:

(1) Kenyataan polis merupakan satu dokumen yang keistimewaanya mutlak, kekal istimewa dan tanggungjawab untuk memelihara kenyataan polis adalah berterusan dan tidak akan tamat walaupun kes telah dilupuskan (lihat perenggan 21).

(2) Kenyataan polis tergolong dalam satu kelas khas dokumen, pendakwaan tiada tanggungjawab untuk membekalkan sesalinan penyataan yang di ambil kepada pembelaan kecuali mana pendakwaan sendiri telah mengetepikan keistimewaan terhadap dokumen-dokumen tersebut. Kekebalan tersebut boleh diketepikan apabila keterangan saksi yang membuat penyataan polis tersebut yang dicabar dan pembelaan atau pendakwaan bercadang untuk mencabar kebolehpercayaan saksi tersebut, barulah mahkamah boleh menguna pakai budi bicara dan menentukan sama ada ianya relevan, perlu dan dikehendaki untuk kepentingan keadilan untuk pendakwaan membekalkan kenyataan tersebut kepada pembelaan (lihat perenggan 22).

(3) Seksyen 5 KTJ tidak terpakai memandangkan tiada kelompongan di dalam KTJ atas isu ini menyebabkan ianya tidak perlu merujuk kepada undang-undang Inggeris atau bidang kuasa luar lain (lihat perenggan 23).

(4) Walaupun di peringkat pembelaan, pembelaan saksi/saksi-saksi boleh sentiasa berlaku dalam pelbagai bentuk. Kenyataan polis yang dirakam di

bawah s 112 KTJ tidak boleh dikategorikan sebagai 'bahan-bahan tidak dipakai; kerana keistimewaan mutlaknya. Budi bicara yang diberikan kepada mahkamah adalah untuk memastikan tiada pembegaan saksi pada mana-mana peringkat prosiding dan juga untuk memastikan perbicaraan adil dan mengelakkan salah laksana undang-undang (lihat perenggan 24–25).

(5) Dalam kes ini, walaupun mahkamah mengetepikan permohonan tertuduh untuk penemuan, hak tertuduh untuk perbicaraan adil tidak dikurangkan kerana setelah dimaklumkan dan menerima tawaran saksi, tertuduh mempunyai hak automatik untuk menemu bual saksi dan memutuskan sama ada ingin untuk memanggil mereka sebagai saksi pembelaan atau sebaliknya (lihat perenggan 28).]

Notes

For a case on summons to produce, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2361.

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (refd)
Husdi v PP [1979] 2 MLJ 304 (refd)
Husdi v PP [1980] 2 MLJ 80, FC (folld)
Martin Rhienus v Sher Singh [1949] MLJ 201, CA (refd)
Muhammad bin Kadar and another v PP [2011] 3 SLR 1205, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Teoh Choon Teck [1963] 1 MLJ 34 (refd)
R v Bryant (1946) 31 Cr App Rep 146, CA (refd)

Legislation referred to

Criminal Procedure Code ss 5, 51, 51(1), 51A, 108A, 112, 120
Evidence Act 1950 ss 77, 145

Muhamad Iskandar Ahmad (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Gooi Soon Seng (Gooi & Azura) for the applicant.

Azmi Ariffin J:

INTRODUCTION

[1] In essence, this is an application made by the applicant under s 51(1) of the Criminal Procedure Code ('the CPC') via notice of motion dated 5 November 2018 (encl 1) supported by affidavit affirmed by Kulaselvi Sandrasegaran dated 5 November 2018 for an order from this court to direct

the prosecution to provide copies of statements recorded under s 112 of the CPC to the applicant made by the seven named witnesses offered by the prosecution to the defence at the close of the prosecution case. The witnesses are:

(a) Ahmad Fuad Ramli;

(b) Lim Cheng Gam;

(c) Tomie Yoshio;

(d) Ng Wai Hoong;

(e) Dessy Meyrisinta;

(f) Raisa Rinda Salma; and

(g) Kamaruddin Masiod.

[2] In respect of Muhammad Farid bin Jallaludin, a non offered witness where his statement was also recorded by the police, the applicant has decided not to pursue her request for his statement to be supplied to the applicant.

LAW

[3] Section 51(1) of the CPC provides as follows:

> Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or documents is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summon or order.

WHAT AMOUNTS TO NECESSITY OR DESIRABILITY?

[4] Section 51 authorises that documents or things which are necessary or desirable for the purpose of the trial or investigation may be ordered to be produced. So the document or thing called for must have some relation to or connection with the subject matter of the investigation or inquiry or throw some light on the proceeding or supply some link in the chain of evidence. The case on point is *Public Prosecutor v Teoh Choon Teck* [1963] 1 MLJ 34.

THE APPLICANT'S CONTENTIONS

[5] The main issue here is whether the applicant has met the dual requirement of necessity and desirability laid down in s 51(1) of the CPC? Learned counsel for the applicant contended that it is the public prosecutor's

duty to disclose all relevant documents to the defence to ensure that the applicant gets a fair trial. Furthermore, according to learned counsel, the statement recorded under s 112 of the CPC can never be privileged as the law allows it to be admitted as evidence. The statements are not the property of the government but instead it is the property of the public to ensure that justice is done.

[6] In addition to that learned counsel also urged this court to adopt and apply the Commonwealth jurisdictions including Singapore and Brunei which have undergone a lot of development of law in imposing some form of non-statutory disclosure obligation on the prosecution. Counsel then submitted that it is against the notion of justice for the prosecution to withhold the statements in its possession that tend to undermine the prosecution's case or strengthen the defence's case. The case of *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 which is a decision of the Court of Appeal in Singapore was heavily relied on by learned counsel which set out the law pertaining to the duty of the prosecution to disclose unused material to the defence.

[7] It was also contended that the danger of tampering with witnesses does not arise in the instant case as the prosecution has completed its case and the statements which the applicant requested for are from the witnesses offered by the prosecution. Furthermore, the prosecution admitted that they are still in the process of locating a few named witnesses as offered and therefore there can be no risk that the witnesses could be tampered with. In the upshot, learned counsel urged this court to depart from the decision of Justice Syed Othman in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 so as to keep abreast with the law as developed in all other Commonwealth jurisdictions.

THE RESPONDENT'S RESPONSE

[8] In his opposing submission, the learned deputy public prosecutor submitted that statements recorded under s 112 of the CPC are privileged documents which cannot be supplied to the applicant because there is a real danger of tampering with witnesses as stated in *Husdi*'s case. Furthermore, the applicant has been accorded a fair trial and the requirement of justice in this case has been met when the prosecution had given all the documents and materials requested by the defence before the trial and in the course of the trial. The learned deputy also argued that there was no lacuna in our Criminal Procedure Code relating to the issue of disclosure by the prosecution, hence s 5 of our CPC is not applicable. It was also submitted that the authorities and principles on prosecutorial disclosure in other common law jurisdictions including Singapore and Brunei cannot be adopted as it is only of persuasive authority in nature. Learned deputy contended that this court is bound by the

decision of the Federal Court in *Husdi v Public Prosecutor* which referred and followed the case of *R v Bryant* (1946) 31 Cr App Rep 146. According to the learned deputy the principle of law on which the court reaches its decision in *Husdi*'s case must be followed as it is still a good law until today.

[9] Turning now to the present case, the pertinent question to be asked is whether the word 'document' in s 51 of our CPC can also include statement recorded under s 112 of the CPC. To me, it is a settled principle of law that s 51 allows the applicant to seek production of document in the possession of the prosecution. The court has discretion to allow for discovery of document but only for a limited access. The discretion given is only confined to the production of documents or materials which are necessary or desirable for the purpose of the trial eventhough literally reading the language in that section seems to be capable of allowing for a wide range of application.

[10] Having said that, I now turn on the question of whether this court can direct the prosecution to supply the statements recorded under s 112 of the CPC as sought for by the applicant. In exercising such discretion the court would also need to consider the justice of the case and at what stage of the proceeding for discovery the application was made.

[11] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 Justice Augustine Paul (as he then was) said:

> A police statement recorded under s 112 of the CPC is absolutely privileged (see *Martin Rhienus v Sher Singh* [1949] 2 MLJ 201, *Husdi v PP* [1979] 2 MLJ 304. However the defence may have access to it for the purpose of impeaching the credit of a witness (see *Husdi v PP* [1980] 2 MLJ 80.

[12] His Lordship then added:

> In any event, as a police statement is privileged, no adverse inference can be drawn from his non-production. This is based on the principle that the drawing of an adverse inference for the failure to produce a privileged document would be to destroy the privileged itself.

[13] In another case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312 the accused filed an application by way of an originating motion under s 51 and/or s 51A of the CPC for an order to compel the prosecution to produce the document, and materials which amongst others include a numbers of witnesses statements named and not named under s 112 of the CPC. It should be pointed out that in the *Anwar*'s case the application was made before the commencement of the trial.

[14] The High Court allowed most parts of the accused's application except

A statements under s 112 of the CPC of other witnesses not named by the accused. On appeal, the Court of Appeal overruled the finding of the trial judge.

B **[15]** The Court of Appeal is of the view that the learned judge erred in law in not observing the judicial precedents with regards to the interpretation of s 51 of the CPC in exercising his discretion. On further appeal, the Federal Court affirms the Court of Appeal findings. In coming to the said conclusion, reference was also made by the Federal Court to the case of *R v Byrant*.

C **[16]** Similarly in *Martin Rhienus v Sher Singh* [1949] MLJ 201 Willian CJ said:

> The question was raised by the court whether the provision of s 113 of the Criminal Procedure Code prevent a statement made under s 112 from being given in evidence
D at all, even in civil proceeding, but having decided that statements made under s 112 are absolutely privileged it is not necessary for me to decide this further question.

[17] Justice Syed Othman FJ (as he then was) sitting in a criminal revision in the High Court case of *Husdi v Public Prosecutor* [1979] 2 MLJ 304 summed
E up the legal position regarding police statement where he has this to say:

> The purpose of the police officer taking these statements is merely to collate evidence relating to circumstances surrounding the offence alleged in the first information, and also to determine whether or not there is sufficient or further evidence to prosecute the accused person. On completion of investigation the
F investigating officer is required by law to report to the public prosecutor. See s 120 Criminal Procedure Code. On the first information, police statement and other evidence, the Public Prosecutor decides whether or not to prosecute. By the very nature of the actions taken, police statements belong to a special class. Considering it under the Evidence Act, it does not come under s 78 which sets out the mode of
G the proof of every public document prescribed therein. Neither does it fall under s 79 which relates to presumption as to genuineness of certified copies, nor under s 80 which relates to presumption as to documents produced as evidence. And it must be noted that even if such statements to be used for impeachment, it must be proved, unless the witness to be impeached admits to having made such statement.
H See s 145 of the Evidence Act. A first information is admissible on production. See s 108A Criminal Procedure Code. Section 77 of the Evidence Act, as I see it, relates only to a public document where any person has the right to inspect.
>
> Considering the provisions in the Criminal Procedure Code and the Evidence Act, I can find no provision which is construable as giving a right to inspect a police
I statement.

[18] At p 307, His Lordship further said in these words:

> But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to

inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses. For the foregoing reasons, in the circumstances shown in the present application, the defence is not entitled to be supplied with police statements.

[19] In *Husdi v Public Prosecutor* [1980] 2 MLJ 80, Suffian LP (as he then was) held that where the defence seeks to impeach the credit of a prosecution witness, the defence can be supplied with a copy of the witness statement. The Federal Court agreed with the view expressed by Justice Syed Othman where in his judgment, Suffian LP said at pp 81–82:

> Encik Sri Ram cites s 5 of the Code, which provides that where there is lacuna in our law relating to criminal procedure, the court should apply English law, in so far as the same shall not conflict or be inconsistent with the Code and can be made auxiliary thereto. He then cites various English authorities showing that in the circumstances set out in questions as narrowed down, the proper cause is for statement to the defence, direct, without the intervention of the court. This is in contrast to the procedure under the old s 113(ii), under which there were two steps when the defence made a request:
>
> > step 1 — the court referred to the statement, and
> >
> > step 2 — the court directed the counsel for the accused to be furnished with a copy of the statement, if the court thinks it expedient in the interest of justice.
>
> We are of the opinion that when the defence wants to impeach the credit of a prosecution witness, it is entitled to a copy of his police statement; not, however, directly as in England, but, as under the old s 113(ii), i.e after the court has seen it and 'thinks it expedient in the interest of justice' to order a copy to be supplied ...

[20] Further down in the same judgment, His Lordship continued:

> ... Our conclusion is not inconsistent with judgment of Syed Othman FJ in *Husdi v Public Prosecutor* out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

FINDINGS

[21] For completeness, thus, it can be comprehended with ease that police statement is an absolutely privileged document. This privileged status will remain not only at the pre-trial stage but also when the trial proper has commenced or taken off in the sense that evidence has been led by calling of witnesses. The obligation to preserve the police statements is a continuing one and will never end even when the case has been completely disposed of.

A **[22]** There can be no doubt that police statement belong to a special class of document. This must be so because even if the prosecution decides not to call the witness and make them available to the defence, they are under no duty to supply a copy of the statement taken to the defence unless the prosecution himself waived the privilege over the witness statements. The powerful use of the word absolute privilege speak for itself. Such 'immunity' shield can also be lifted or waived when the testimony of a witness who make the police statement has been challenged and the defence propose to impeach his credit at the prosecution stage or the prosecution intend to impeach the credit of the defence witness at the defence stage. Only in the latter circumstances, the law allows the court to intervene and exercise its discretionary power for discovery and to determine whether it is relevant, necessary or desirable in the interest of justice for the prosecution to supply the statement to the defence. Therefore, there can be doubt that the object of s 51 is for a limited access and its scope is restricted in law. To me, this is the fundamental safeguard built into the law to guarantee equality and fairness in a trial.

[23] Moving further, I am also of the view that s 5 of the CPC is not applicable to the applicant as there was no lacunae in the Code on this issue making it unnecessary for me to resort to the English law and other foreign jurisdiction.

[24] On the contention by learned counsel that the issue of tampering of witnesses will no longer arise when the prosecution had completed its case and these witnesses were offered to the defence, with respect, I beg to differ. I am of the view that even at the defence stage tampering of witness/ witnesses can always happen in many forms such as using any type of physical force to keep a witness from testifying, or persuading a witness to change their testimony, and blackmailing or bribing a witness and attempts to keep a witness from testifying.

[25] Furthermore, even after these witnesses are offered to the defence, the police statement recorded under s 112 of the CPC in Malaysia can never be categorised as 'unused material' as repeatedly mentioned in the Singapore's case of *Muhammad Kadar v Public Prosecutor* because of its absolute privilege nature. The discretionary powers given to the court to safeguard the disclosure or discovery of the police statements given by the witnesses is not only to ensure no tampering of witnesses at any stage of the proceeding but also to ensure a fair trial and the avoidance of miscarriage of justice.

[26] To the best of my knowledge, the above Malaysian decided cases that I have quoted, specifically on this contested issue, has never been reversed, overruled, superseded or considered no longer good law and typically cannot be relied upon. As an agent of justice, I would like to emphasise that I am

bound by the judgment of our apex court and must apply the law as stated therein. In other words, the said quoted Federal Court decision must be observed, followed and accepted to avoid uncertainty in the law.

[27] It is trite that the doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decision of the courts of a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal (per Peh Swee Chin FCJ in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1).

[28] In the present case, even if the applicant's application for discovery is dismissed by this court, the applicant's right to have a fair trial had not been deprived or compromised. This is because after having alerted and accepted the offer of the witnesses, the applicant will have the automatic right to interview the offered witnesses and to decide whether to call them as a defence witness or otherwise.

[29] If the prosecution failed to make them available to be interviewed and present in court then the prosecution will have to explain to this court why they have failed to do so. The learned deputy public prosecutor informed this court and as admitted by them in their affidavit in reply, the prosecution is still in the midst of locating the witnesses offered by them.

[30] On this note, I would also like to say that I do not wish to speculate on this issue because at this point in time I do not know whether the prosecution is able to secure the attendance of all these witnesses and make them available to the defence. We will definitely cross that bridge when we come to it.

[31] To me, there is no slightest doubt in my mind that the prosecution knew that they have the bounden duty to secure the attendance of all the named witnesses except for the late Lim Cheng Gam who I was officially informed has recently passed away. The applicant may after having conducted the interview decided not to call any of the witnesses offered for whatever reason best known to her but that did not detract the prosecution from its duty to produce them in court.

[32] Having scrutinised the local and foreign authorities cited and after considering the submissions of learned counsel for the applicant and the learned deputy public prosecutor for the respondent and for the reasons stated above, I find that the notice of motion in encl 1 is without merit and must be dismiss.

[33] Finally, before I adjourn this proceeding, I wish to thank learned deputy

A and learned counsel for their submission. Last but not least, my appreciation goes to all their backup team who have done a very comprehensive research on this interesting point of law.

Application dismissed.

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Reported by Izzat Fauzan

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